

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1523 OF 2005

M/s. Doshi Developers
and Anr. ..Petitioners

Vs.

State of Maharashtra & Anr. ..Respondents

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Mr. S.V.Marwadi i/b Sushant P.Narkar for
Petitioners
Mr.M.S.Motiwala i/b M/s. P.D.S.legal
for Respondent no.1
Mr.M.S.Mhambray A.P.P. for the State
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CORAM: SMT. V.K. TAHILRAMANI, J.
DATE OF RESERVING
THE ORDER : 22.08.2005
DATE OF PRONOUNCING
THE ORDER : 31.08.2005

P.C.

1. Heard the learned advocate for the petitioners i.e. original accused in C.C.No. 1557/S/2022 (originally numbered as CC No.1307/S/2000). Heard the learned advocate for the Respondent no.1-original complainant. The said complaint was filed in the 37th Court, Esplanade, Mumbai against the petitioners for an offence under Section 138 of

Negotiable Instruments Act.

2. By order dated 11.9.2003, the learned Magistrate dismissed the complaint as the complainant was absent. On the very next day, the complainant made an application for restoration of the case. He stated therein that on account of his ill-health, he could not remain present in the Court. On hearing both the sides, the learned Magistrate allowed the application and restored the complaint i.e. C.C.No.1557/S/2000 on file.

3. Being aggrieved by the said order, the petitioners preferred revision before the Sessions Court for setting aside the order of the Magistrate restoring the complaint. The learned Sessions Judge by order dated 6.5.2005 dismissed the revision application. Being aggrieved by the said order dated 6.5.2005 passed by the learned Addl. Sessions Judge, this petition has been preferred.

4. It is well settled legal position that a Magistrate has no power to review or recall his own order or the order passed by his predecessor. The

learned Magistrate has no inherent power and in the absence of any specific provision empowering the Magistrate to restore the complaint, the learned Magistrate could not have restored the complaint which was dismissed by him. From various decisions of the Supreme Court including the decisions of the Supreme Court in the case of **Adalat Prasad Vs. Rooplal Jindal & Ors. [(2004) 7 SCC 338]**, and **Major General A.S.Gaurayya and another Vs. S.N.Thakur and Another (1986) 2 SCC 709**, it is clear that a Magistrate cannot review or recall his own order. Thus, in such case, the Magistrate could not have recalled his order dated 11.9.2003 whereby the complaint came to be dismissed. Obviously, when the learned Magistrate did not have the power to recall his own order and to restore the complaint, the learned Sessions Judge in revision could not have confirmed the said order. Had the learned Magistrate rejected the application for restoration and the Sessions Judge allowed the revision, the situation would have been different. However, here the order passed by the Magistrate is clearly illegal and erroneous and hence, in revision such an order could not have been

confirmed.

5. The Supreme Court in the case of **Mohammad Azeem Vs. A.Vankatesh and Anr. [2003 ALL MR (Cri) 400 (S.C.)]** has held that if the complaint has been dismissed for non-appearance of the complainant, the complaint ought to be restored on file on sufficient cause being shown. Mr.Marwadi, has submitted that in the case of Mohammed Azeem, the complainant had remained absent only on a single date and hence, the complaint came to be restored. However, in the present case, the complainant remained absent on four occasions and in such circumstances, the learned Magistrate had rightly dismissed the complaint.

6. In the present case, the complainant being unwell, he could not attend the Court on the said four dates. The fact that he was unwell is not specifically denied. Even though Section 256 of Cr.P.C. provides that the complaint can be dismissed if the complainant does not appear, a bare perusal of the said Section clearly shows that it is not the only option available to the

Magistrate if the complainant is absent. The latter part of Section 256 of Cr.P.C. clearly indicates that "the Magistrate has another option i.e. to adjourn the hearing of the case to some other date. The third option which is available to the Magistrate under this Section is that, the Magistrate may proceed with the case if in the opinion of the Magistrate, the personal appearance of the complainant is not necessary. The reasons for absence of the complainant can be numerous. Sometimes the reasons may be beyond the control of the complainant. If the complainant's presence is not required on that particular day, the Magistrate may dispense with the attendance of the complainant and proceed with the case. On the day that the complaint was dismissed, the matter was not specifically kept for recording the evidence of the complainant or for cross-examination of any witness by the complainant.

7. In the present case, it is an admitted fact that the complainant was absent on four occasions. The complainant did not remain present on four occasions in a row but he remained absent on

27.9.1999, thereafter, he has remained present before the Court, thereafter, he was again absent on 28.2.2003, 28.4.2003 and on 11.9.2003. The reason given by the complainant is that on these occasions, he remained absent on account of his ill-health. The fact that the complainant was suffering from ill-health, is not disputed by the petitioners. Their case is only that the complainant was absent on four occasions and hence, the complaint deserves to be dismissed. It is true that the complainant was absent on four occasions but looking to the fact that it was on account of his ill-health, which fact has not been disputed by the petitioners, I am of the opinion that in the interest of justice, the complaint deserves to be restored.

8. In this view of the matter, the order of the learned Magistrate restoring the complaint and the order dated 6.5.2005 of the learned Addl. Sessions Judge, are quashed and set aside, however, looking to the facts of this case and in the interest of justice, the complaint i.e. C.C.No. 1557/S/2002 is restored to file.

9. Writ Petition is allowed in the above terms.

[SMT.V.K.TAHILRAMANI, J.]